BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRYAN M. BORNHOLDT	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,058,616
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the January 2, 2015, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on June 19, 2015, in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent stipulated claimant sustained personal injury by accident arising out of and in the course of his employment and provided timely notice of his accident and injury. Respondent indicated the only issue is whether claimant is permanently partially disabled and entitled to $130,000 or permanently totally disabled and entitled to $155,000.

ISSUES

The ALJ awarded claimant benefits for a permanent total disability.

Respondent asserts claimant is entitled to benefits for a work disability and is not permanently totally disabled.

Claimant, late in the afternoon of June 17, 2015, sent a letter to the Board indicating he was using his submission letter to the ALJ as his brief to the Board. Claimant's brief was due on February 25, 2015.[1] Because claimant filed his brief less than two working days prior to oral argument, respondent and the Board had inadequate time to review the arguments and authorities contained in said brief. Therefore, the Board will not consider claimant's brief.

The sole issue is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant became employed by respondent in 2002 and testified that seven months out of the year he drove a tractor mowing ditches and right-of-ways. The rest of the time he primarily drove a dump truck, but also plowed snow, handled sign posts and signs, fixed guardrails, shoveled asphalt, trimmed trees, removed dead animals from roadways and used a weed eater.

Claimant testified he experienced low back pain after a 2007 incident when the tractor he was driving went off a culvert. He indicated he reported the incident to his supervisor the same day. Claimant testified that on November 17, 2011, he was pulling signs from the back of a truck, carrying them across a highway, and experienced more pain in his left lower back running down the side of his leg into the calf and ankle. Claimant indicated the pain gradually worsened.

Following the 2007 incident, claimant saw Dr. Fan three times beginning in January 2008. Claimant indicated that from 2008 to 2010 he used ibuprofen and was able to do his job, but self-limited to prevent pain. After treating with Dr. Fan, claimant saw Dr. Burton, who prescribed six weeks of physical therapy. Claimant also testified that in 2010, he was treated by his family physician, Dr. Radke, with spinal decompression and physical therapy. Dr. Radke moved and claimant's subsequent family physician, Dr. Alan Davidson, referred claimant to Dr. Ali B. Manguoglu.

Dr. Manguoglu performed back surgery, but claimant considered the surgery 95% unsuccessful. Claimant testified he takes morphine and Valium every day and cannot work for more than 30 minutes to an hour at a time performing minor jobs. He cannot sit at a computer very long without having to get up or lie down. Claimant testified he still sees Drs. Davidson and Manguoglu for back pain and indicated he is not working.

Dr. Manguoglu's records indicate he first saw claimant on September 21, 2011, for left-sided back pain. The doctor indicated claimant reported that four years earlier, he was driving a tractor and ran off a culvert. The doctor testified, ". . . it sounded like this

[1] K.A.R. 51-18-2, *et seq.*, sets forth the appeals process, including the briefing schedule.

gentleman worked hard all his life and he worked for the state, he farmed on the side, he had multiple injuries it sounded like. I mean he could not pinpoint any specific injury at that time."[2]

Dr. Manguoglu's impressions were chronic left-sided back pain, left thigh pain, lumbar spondylosis, degenerative disc disease at L5-S1 with bilateral foraminal narrowing and possible left sacroiliac joint issues.

On October 5, 2011, Dr. Manguoglu indicated EMG and nerve conduction studies were compatible with acute lumbosacral radiculopathy and recommended decompression surgery. Claimant's lumbar myelogram and post myelogram CT scan revealed a large osteophyte at L5-S1 with marked disc space narrowing with bilateral foraminal narrowing. Dr. Manguoglu believed the foraminal narrowing caused claimant to be symptomatic. Dr. Manguoglu testified he reviewed an August 2011 MRI that showed lumbar degenerative disc disease, which the doctor described as wear, tear and arthritis, at L5-S1. On November 9, 2011, after consulting another neurosurgeon, Dr. Manguoglu decided he would exhaust all conservative measures before proceeding with surgery.

Dr. Manguoglu, on April 19, 2012, performed a decompression with foraminotomy at S1. He noted the S1 nerve was decompressed and there was no evidence of a disc herniation.

On June 6, 2012, Dr. Manguoglu completed a work capacity form setting forth claimant's work restrictions: frequent or less sitting, standing and walking (alternating when possible); lifting or carrying 10 pounds or less and reaching above shoulders no more than frequently; lifting or carrying no more than 50 pounds occasionally; limit twisting, bending, squatting, crawling or climbing to occasionally; and never lifting or carrying more than 50 pounds. The work capacity form indicated claimant's treatment and medications would not affect his ability to work.

In a July 30, 2012, letter, Dr. Manguoglu indicated claimant could not drive short distances such as from Hutchinson to Salina, reached maximum medical improvement on July 30, 2012, and was permanently totally disabled from any gainful employment. Dr. Manguoglu testified his opinion that claimant was permanently totally disabled meant claimant could no longer perform his old job with respondent because of his restrictions. Dr. Manguoglu confirmed he did not discuss with claimant his training or education. The doctor testified claimant could no longer perform 13 of 14 job tasks he performed in the five years preceding his accident identified by vocational consultant Robert W. Barnett, Ph.D.

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[2] Manguoglu Depo. at 13.

By order of the ALJ, claimant was evaluated by Dr. Paul S. Stein on May 10, 2012. Claimant reported his back pain began in 2007, when his tractor went over a culvert. He also reported an increase in back pain when, on November 17, 2011, he was lifting signs at work. Claimant indicated he was told his back injury was not work related. Dr. Stein reviewed claimant's extensive medical records and physically examined claimant. The doctor concluded there was objective documentation of left S1 radiculopathy on claimant's EMG as well as on clinical examination.

Using the *Guides*,[3] Dr. Stein opined claimant had a 10% whole person functional impairment. The doctor recommended claimant lift no more than 40 pounds, no frequent repetitive lifting, avoid lifting from below knuckle height or above chest height, avoid repetitive bending and twisting of the lower back and alternate sitting, standing and/or walking on a 30-minute basis. Dr. Stein indicated claimant would be between DOT light and medium categories. Dr. Stein was not asked to provide a task loss opinion.

On August 6, 2013, Dr. Barnett evaluated claimant at his attorney's request. Claimant reported graduating from high school in 1978 and attending college one year. Dr. Barnett was provided a letter from respondent to Dr. Manguoglu, a letter from Dr. Davidson to the Social Security Administration and three letters authored by Dr. Manguoglu. Dr. Barnett's report indicated claimant had a commercial driver's license, but could only drive up to 20 minutes; claimant had difficulty walking and could walk up to 15 feet without difficulty; and claimant took hydrocodone and Valium for pain and Lunesta for sleep. As stated above, Dr. Barnett identified 14 job tasks performed by claimant in the five years prior to his accident. Dr. Barnett indicated claimant was not currently employed, was not seeking work due to chronic pain and, therefore, had a 100% wage loss.

Quoting from the letters of Drs. Davidson and Manguoglu, Dr. Barnett opined claimant was not employable. When Dr. Barnett read part of Dr. Davidson's letter into the record, respondent objected it was medical hearsay. Dr. Barnett acknowledged he did not know the specifics of claimant's injuries or know what jobs claimant held before working for respondent.

At respondent's request, on December 9, 2013, vocational rehabilitation consultant Steve Benjamin performed a job task assessment for the five years preceding claimant's accident. Mr. Benjamin identified 22 job tasks claimant performed working for respondent. He also identified jobs claimant held prior to working for respondent. Mr. Benjamin was provided a copy of the work restrictions imposed by Dr. Manguoglu and, based upon those restrictions, opined claimant could re-enter the open labor market in any position in light, medium-light or sedentary categories that he has the ability to perform. Mr. Benjamin did not perform a labor market survey or look at open positions in the Hutchinson area where

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant lives, but thought it more likely than not there were jobs available within claimant's skills and abilities. Claimant's attorney proffered claimant was diagnosed with a major depressive disorder, took Valium and hydrocodone and was prescribed a cane. He then asked Mr. Benjamin whether those facts affected claimant's employability and Mr. Benjamin indicated the medications could, depending on their side effects.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[5]

K.S.A. 2011 Supp. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability."

In *Wardlow*,[6] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The Board finds claimant is permanently totally disabled. Dr. Manguoglu, who gave no functional impairment rating, opined claimant was permanently totally disabled. Although Dr. Manguoglu indicated he meant claimant could no longer perform his job with respondent, he gave claimant significant work restrictions and opined claimant could no longer perform 13 of 14 tasks at his job with respondent. The doctor also indicated claimant is taking hydrocodone and Valium.

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[4] K.S.A. 2011 Supp. 44-501b(c).

[5] K.S.A. 2011 Supp. 44-508(h).

[6] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

Dr. Davidson's statements and records are not in evidence and Dr. Barnett's opinion based upon those records is not admissible. In *Roberts*,[7] the Kansas Supreme Court ruled that a vocational expert could not base his opinion on Mr. Roberts' disability upon restrictions in medical reports of nontestifiying physicians, which were not admitted as competent evidence.

The Board finds claimant's testimony persuasive. A workers compensation claimant's testimony alone is sufficient evidence of his or her physical condition.[8] Claimant testified his surgery was 95% unsuccessful, he takes morphine and Valium every day, cannot work for more than 30 minutes to an hour at a time performing minor jobs and cannot sit at a computer very long without having to get up or lie down. Claimant testified he still sees Drs. Davidson and Manguoglu for back pain.

Wardlow requires the fact finder to look at all of an injured worker's circumstances when determining if he or she is permanently totally disabled, not just work restrictions. Here, claimant is 55 years of age and is a high school graduate with one year of college. There is no evidence that since retiring from the U.S. Navy he has had specialized training or licenses, other than a commercial driver's license. Driving for more than short periods of time causes him pain. His job experience is somewhat limited as he has been an equipment operator for respondent since 2002. Taking into consideration claimant's physical restrictions, age, education and work experience, the Board finds claimant is permanently totally disabled.

CONCLUSION

Claimant is permanently totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[9] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 2, 2015, Award entered by ALJ Klein.

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[7] *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[9] K.S.A. 2014 Supp. 44-555c(j).

The file does not contain an attorney fee contract between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this ____ day of August, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge